

\*\*E-Filed 4/22/2010\*\*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

IN RE FACEBOOK PPC ADVERTISING  
LITIGATION

Case Numbers 5:09-cv-03043-JF,  
5:09-cv-03519-JF, 5:09-cv-03430-JF

ORDER<sup>1</sup> GRANTING IN PART AND  
DENYING IN PART MOTION TO  
DISMISS AND DENYING MOTION  
TO STRIKE

[re: document no. 46]

Defendant moves to dismiss Plaintiffs' complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted and to strike portions of the complaint pursuant to Fed. R. Civ. P. 12(f). The Court has considered the moving and responding papers and the oral argument of counsel presented at the hearing on March 5, 2010. For the reasons discussed below, the motion to dismiss will be granted in part and denied in part, with leave to amend. The motion to strike will be denied.

**I. BACKGROUND**

This putative class action arises out of individual contracts between Defendant Facebook

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<sup>1</sup> This disposition is not designated for publication in the official reports.

1 PPC (“Defendant”) and Plaintiffs RootZoo, Inc., Matthew Smith, and Steven Price (collectively,  
 2 “Plaintiffs”). Defendant operates a popular social networking website: [www.facebook.com](http://www.facebook.com).  
 3 Complaint ¶ 20. Plaintiffs individually entered into contracts with Defendant for advertising on  
 4 the website. Complaint ¶¶ 50, 60, and 69. Plaintiffs’ advertisements appeared alongside  
 5 Defendant’s social networking content. Complaint ¶ 24.

6 To place an advertisement on Defendant’s website, a potential advertiser must select the  
 7 budget for its advertising campaign and the pricing mechanism that will be used. Complaint ¶  
 8 31. Defendant provides two options for paying for an advertising campaign: cost per click  
 9 (“CPC”) or cost per thousand impressions (“CPM”). Complaint ¶ 29. Plaintiffs each entered  
 10 into CPC contracts. Complaint ¶¶ 50, 61, and 69. From the web page that directs the potential  
 11 advertiser to choose the budget and pricing options, Defendant provides links to other web pages  
 12 on which Defendant makes representations that it will charge only for “legitimate clicks”.  
 13 Complaint Ex. A. Such representations are found in Defendant’s “Help Center”, which contains  
 14 links to web pages entitled “Ads: Glossary of Ad Terms”, “Ads: Campaign Costs and  
 15 Budgeting”, and “Ads: Advertising Credits and Coupons” (collectively, “the Extrinsic  
 16 Evidence”). Complaint Exhs. B-E.

17 The “Ads: Glossary of Ad Terms” web page contains the following statement with  
 18 respect to “clicks”:

19 We have a variety of measures in place to ensure that we only report and charge  
 20 advertisers for *legitimate clicks*, and not clicks that come from automated programs, or  
 21 clicks that may be repetitive, abusive, or otherwise inauthentic. Due to the proprietary  
 nature of our technology, we’re not able to give you more specific information about  
 these systems.

22 Complaint Ex. B (emphasis added). The “Ads: Glossary of Ad Terms” page also contains a  
 23 statement that “CPC stands for Cost Per Click. If your ads are bid on a CPC basis, you will be  
 24 charged when *users* click on your ads and visit your website.” Complaint Ex. C (emphasis  
 25 added). Finally, the complaint alleges that Defendant made additional public statements  
 26 indicating that it had taken measures to identify “suspicious” clicks. Complaint ¶ 46.

27 An advertiser also must agree to Defendant’s Advertising Terms and Conditions (“the  
 28 Written Agreement”). Complaint ¶ 88. The Written Agreement includes the following

1 disclaimer:

2 I [PLAINTIFF] UNDERSTAND THAT THIRD PARTIES MAY GENERATE  
 3 IMPRESSIONS, CLICKS OR OTHER ACTIONS AFFECTING THE COST OF THE  
 4 ADVERTISING FOR FRAUDULENT OR IMPROPER PURPOSES, AND I ACCEPT  
 5 THE RISK OF ANY SUCH IMPRESSIONS, CLICKS, OR OTHER ACTIONS.  
 FACEBOOK SHALL HAVE NO RESPONSIBILITY OR LIABILITY TO ME IN  
 CONNECTION WITH ANY THIRD PARTY CLICK FRAUD OR OTHER IMPROPER  
 ACTIONS THAT MAY OCCUR

6 Howitson Decl. Exhs. 1-2 at “Indemnification” section (“the Disclaimer”).<sup>2</sup>

7 Plaintiffs allege they have been charged for “invalid clicks” and “fraudulent clicks”.  
 8 Complaint ¶¶ 51, 63, and 71. The complaint attributes these clicks to “(a) technical problems;  
 9 (b) system implementation errors; (c) various types of unintentional clicks; (d) incomplete clicks  
 10 that fail to open the advertiser’s web page; and (e) improperly recorded or unreadable clicks  
 11 originating in some cases from an invalid proxy server or unknown browser types.” Complaint ¶  
 12 4. The complaint describes “click fraud” as the “result of a competitor clicking on an  
 13 advertiser’s ad in order to drive up the cost of an ad or deplete the competitor’s budget for  
 14 placing ads.” Complaint ¶ 36.

15 Plaintiffs filed the instant action on July 7, 2009, seeking relief under California’s Unfair  
 16 Competition Law (“UCL”), Cal. Bus. Prof. Code § 17200 *et seq.*; remedies for breach of contract  
 17 and the implied covenant of good faith and fair dealing; a judicial declaration of the rights and  
 18 obligations of the parties under the subject contracts; and remedies for unjust enrichment.

## 19 I. MOTION TO DISMISS

### 20 A. Legal standard

21 “Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a  
 22 cognizable legal theory or sufficient facts to support a cognizable legal theory.” *Mendiondo v.*  
 23 *Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). For purposes of a motion to  
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25 <sup>2</sup> Plaintiffs dispute that the Disclaimer is present in their contracts. Complaint ¶ 3. In its  
 26 moving papers, Defendant provides copies of the Advertising Terms and Conditions in effect at  
 27 the times Plaintiffs agreed to advertise on Defendant’s website. The Advertising Terms and  
 28 Conditions contain the Disclaimer. Plaintiffs have not disputed the authenticity of these  
 documents, and their opposition papers respond to the Disclaimer as if it were included in their  
 contracts.

dismiss, the plaintiff's allegations are taken as true, and the court must construe the complaint in the light most favorable to the plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)). Thus, a court need not accept as true conclusory allegations, unreasonable inferences, legal characterizations, or unwarranted deductions of fact contained in the complaint. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-755 (9th Cir. 1994).

Leave to amend must be granted unless it is clear that the complaint's deficiencies cannot be cured by amendment. *Lucas v. Dep't of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995). When amendment would be futile, however, dismissal may be ordered with prejudice. *Dumas v. Kipp*, 90 F.3d 386, 393 (9th Cir. 1996).

#### **B. Documents considered**

Plaintiffs attach several documents to their complaint. Such documents may be considered on a motion to dismiss. Fed. R. Civ. P. 10(b). Defendant provides copies of the Advertising Terms and Conditions in effect at the times that Plaintiffs placed their first advertisements on Defendant's website. Howitson Decl. Exhs. 1 and 2. The complaint alleges the contents of at least a portion of these exhibits. Complaint ¶ 3. Plaintiffs dispute that all of the terms set forth in the documents actually are present in the Written Agreement between the parties, but they do not question the authenticity of Defendant's exhibits and respond to the instant motion as if the terms were included in the Written Agreement. Accordingly, the Court also may consider these documents. *See Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1127 (9th Cir. 2002) (holding that "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss"); and *In re Stac Elcs. Sec. Litig.*, 89 F.

3d 1399, 1405 n.4 (9th Cir. 1996) (noting that complete copies of documents whose contents are alleged in the complaint may be considered in connection with a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6)).

#### C. Breach of Contract Claims

Defendant argues that Plaintiffs have failed to state a claim for breach of contract because the contract expressly waives Defendant's liability for third-party click fraud. Plaintiffs argue that the Written Agreement is ambiguous. Under California law, interpretation of a contract is a two-step process:

"First the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine 'ambiguity,' i.e., whether the language is 'reasonably susceptible' to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is 'reasonably susceptible' to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step—interpreting the contract."

*Wolf v. Superior Court*, 114 Cal. App. 4th 1343, 1351 (Cal. App. 2d Dist. 2004). However, while the California rule governing consideration of extrinsic evidence is rather relaxed, "[t]his rule must be restricted to its stated bounds; it does no more than allow extrinsic evidence of the parties' understanding and intended meaning of the *words used in their written agreement*." *Brawthen v. H & R Block, Inc.*, 28 Cal. App. 3d 131, 136 (Cal. App. 1st Dist. 1972) (emphasis in the original). Plaintiffs thus must do more than claim that the Written Agreement is ambiguous; they must point to specific words in the Written Agreement and allege the existence of credible evidence of the parties' intended meaning of those words.

##### 1. Ambiguous terms in the Written Agreement

As an initial matter, Plaintiffs argue that the Written Agreement's integration clause itself is ambiguous. The clause reads:

"[T]hese terms and conditions, the Advertising Guidelines and *other applicable Facebook policies*, and the terms of any applicable advertising order submitted through the site constitute the entire and exclusive agreement between the parties with respect to any advertising order I place[.]"

Howitson Decl. Exhs. 1-2 at "Miscellaneous" section (emphasis added). Plaintiffs contend that the phrase "other applicable Facebook policies" refers to the Extrinsic Evidence on Defendant's website. Plaintiffs also argue that the terms "risk" and "click fraud" in the Disclaimer are

1 ambiguous. The Disclaimer is included in a section of the Written Agreement in which  
 2 Defendant also disclaims warranties for non-infringement, merchantability, and fitness for any  
 3 purpose. Conceivably, the term “risk” could refer to some danger other than being charged for  
 4 non-“legitimate” clicks, such as infringement, lack of merchantability, or lack of fitness. The  
 5 term “click fraud” is not defined explicitly anywhere in the Written Agreement.

## 6 **2. Credible evidence concerning the parties’ intentions**

7 Plaintiffs do not allege that the Extrinsic Evidence existed at the time the parties entered  
 8 into the Written Agreement or that Plaintiffs were aware of the existence of the Extrinsic  
 9 Evidence at that time. Under these circumstances, the Extrinsic Evidence is immaterial with  
 10 respect to the intentions of the parties at the time they entered into the Written Agreement.

## 11 **3. Whether the contract language is reasonably susceptible to Plaintiffs’ 12 interpretation**

13 The Court concludes that most of the terms in question are not reasonably susceptible to  
 14 Plaintiffs’ proposed interpretations. Because the Extrinsic Evidence is immaterial under the  
 15 circumstances, the term “other applicable Facebook policies” is not reasonably susceptible to an  
 16 interpretation as a reference to the Extrinsic Evidence. Nor do Plaintiffs propound constructions  
 17 of the terms “risk” and “click fraud” that are reasonable under the circumstances. The  
 18 Disclaimer provides that “Facebook shall have no responsibility or liability to me in  
 19 connection with any third party click fraud or other improper action that may occur.” The term  
 20 “click fraud” directly follows the Disclaimer’s reference to “clicks or other actions affecting the  
 21 cost of the advertising” that are generated by third parties for “fraudulent or improper purposes”.  
 22 Though the terms “risk” and “click fraud” may be ambiguous in the abstract, the words of the  
 23 Written Agreement are not reasonably susceptible to an interpretation that would render  
 24 *Defendant* liable for third-party click fraud, even under the definition of “click fraud” provided  
 25 by Plaintiffs.

26 However, the Disclaimer may be ambiguous with respect to whether it covers only  
 27 “click fraud and other improper actions” by “*third parties*”. Plaintiffs claim that they  
 28 have been charged for “invalid clicks” that are the result of Defendant’s own conduct. As

discussed previously, they allege that “invalid clicks” can result from deficiencies in Defendant’s system as a result of “(a) technical problems; (b) system implementation errors; (c) various types of unintentional clicks; (d) incomplete clicks that fail to open the advertiser’s web page; and (e) improperly recorded or unreadable clicks originating in some cases from an invalid proxy server or unknown browser types.” Complaint ¶ 4. Such “invalid clicks” arguably need not be fraudulent, improper, or the result of the actions of third parties. The language of the contract is reasonably susceptible to this interpretation even without reference to the Extrinsic Evidence.

#### **D. Breach of the Implied Covenant of Good Faith and Fair Dealing**

“There is implied in every contract a covenant by each party not to do anything which will deprive the other parties thereto of the benefits of the contract.” *Harm v. Frasher*, 181 Cal. App.2d 405, 417 (Cal. Ct. App. 1960). A “breach of a specific provision of the contract is not a necessary prerequisite” to establishing a breach of the implied covenant of good faith and fair dealing. *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 373 (1992). However, “[t]he implied covenant will not apply where no express term exists on which to hinge an implied duty, and where there has been compliance with the contract’s express terms.” *Berger v. Home Depot U.S.A., Inc.*, 476 F. Supp. 2d 1174, 1177 (C.D. Cal. 2007). With respect to “click fraud”, the Disclaimer expressly precludes the duty that Plaintiffs seek to imply.

While Plaintiffs have stated a claim for breach of contract at least as to “invalid clicks”, “[i]f the allegations in a breach of implied covenant claim ‘do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated.’” *Schulken v. Wash. Mut. Bank*, No. C. 09-02708 JW, 2009 WL 4173525 (N.D. Cal. Nov.19, 2009) (citing *Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*, 222 Cal. App. 3d 1371, 1395 (Cal. Ct. App. 1990)). Plaintiff’s claim of breach of the implied covenant of good faith and fair dealing relies upon essentially the same allegations as their breach of contract claim.

#### **E. Unjust Enrichment**

An unjust enrichment claim requires the allegation of the “receipt of benefit and [the]



unjust retention of the benefit at the expense of others.” *Lectrodryer v. SeoulBank*, 77 Cal. App. 4th 723, 726 (Cal. Ct. App. 2000). However, the remedy for unjust enrichment applies only in the absence of an adequate remedy at law. *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1167 (9th Cir. 1996) (finding that unjust enrichment does not lie where there is a contract defining the parties’ rights). Because Plaintiffs have stated a claim for breach of contract as to their allegations regarding “invalid clicks”, a separate remedy for unjust enrichment is unnecessary. Because Plaintiffs have not to this point alleged any basis upon which Defendant would be liable for “click fraud”, their claim that Defendant has unjustly retained benefits resulting from “click fraud” is insufficient as well.

## **F. Unfair Competition Claims**

The UCL prohibits any “unlawful, unfair or fraudulent business practices.” Cal. Bus. & Prof. Code § 17200, *see also Cel-Tech Commc’ns, Inc. v Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999). Because the statute is written in the disjunctive, it applies separately to business practices that are (1) unlawful, (2) unfair, or (3) fraudulent. *See Pastoria v. Nationwide Ins.*, 112 Cal. App. 4th 1490, 1496 (2003). Plaintiffs contend that Defendant’s conduct has violated all three prongs. Defendant argues that Plaintiffs have failed to state a claim under the UCL because Plaintiffs lack standing and have not alleged sufficient facts to demonstrate an unlawful, unfair, or fraudulent practice.

### **1. Standing**

Private individuals have standing under the UCL if they “suffered injury in fact and [have] lost money or property as a result of the unfair competition.” Cal. Bus. Prof. Code § 17204. Defendant contends that Plaintiffs’ UCL claim is insufficient because any losses suffered by Plaintiffs were a result of third-party click fraud, rather than Defendant’s own conduct. However, Plaintiffs allege that they have been injured by Defendant’s *direct* conduct in the form of charges for “invalid clicks” and “click fraud”.

Defendant is correct that, at least as to claims under the fraudulent prong of the UCL, a plaintiff also must plead reliance. *In re Tobacco II Cases*, 46 Cal. 4th 298, 326 (2009). “[R]eliance is proved by showing that the defendant’s misrepresentation or nondisclosure was



1 ‘an immediate cause’ of the plaintiff’s injury-producing conduct. [Citation.] A plaintiff may  
 2 establish that the defendant’s misrepresentation is an ‘immediate cause’ of the plaintiff’s conduct  
 3 by showing that in its absence the plaintiff ‘in all reasonable probability’ would not have engaged  
 4 in the injury-producing conduct.” *Id.* (internal quotation marks and citations omitted). Reliance  
 5 can be presumed if the misrepresentation was material, that is, “if a reasonable man would attach  
 6 importance to its existence or nonexistence in determining his choice of action in the transaction  
 7 in question.” *Id.* As discussed earlier, Plaintiffs do not allege that the Extrinsic Evidence existed  
 8 at the time the parties entered into the Written Agreement or that they knew of the existence of  
 9 the Extrinsic Evidence at that time. Accordingly, Plaintiffs have failed to allege reliance  
 10 sufficiently.

## 11 **2. Facts sufficient to state a claim**

### 12 **i. Unlawful practices**

13 “By proscribing ‘any unlawful’ business practice, [the UCL] ‘borrows’ violations of other  
 14 laws and treats them as unlawful practices that the unfair competition law makes independently  
 15 actionable.” *Cel-Tech*, 20 Cal. 4th at 180. “California courts have not foreclosed common law  
 16 theories as a basis for actions pursuant to [the UCL]”, *Mercado v. Allstate Ins. Co.*, 340 F.3d  
 17 824, 828 n.3 (9th Cir. 2003). Plaintiffs’ allegation of a systematic breach of contract is a  
 18 sufficient predicate for unlawful business practices.

### 19 **ii. Unfair practices**

20 What constitutes unfair conduct in consumer actions under the UCL is unclear. *Camacho*  
 21 *v. Automobile Club of Southern California*, 142 Cal. App. 4th 1394, 1400 (Cal. Ct. App. 2006).  
 22 *Camacho* held that “unfairness” under the UCL should be judged by the same standard used by  
 23 the Federal Trade Commission under 15 U.S.C. § 45(n). *Id.* at 1403. 15 U.S.C. § 45(n) provides  
 24 three elements for what constitutes “unfair”: 1) substantial injury, 2) the complained-of practice  
 25 is not outweighed by any countervailing benefits to consumers or competition, and 3) the injury  
 26 must be one that consumers themselves could not reasonably have avoided. *See also Davis v.*  
 27 *Ford Motor Credit Co.*, 179 Cal. App. 4th 581, 584 (Cal. App. 2d Dist. 2009) (applying the  
 28 unfairness test from *Camacho*).

1 “An injury may be sufficiently substantial . . . if it does a small harm to a large number of  
 2 people.” *American Financial Services Asso. v. FTC*, 767 F.2d 957, 972 (D.C. Cir. 1985)  
 3 (discussing substantial injury under 15 U.S.C. § 45(n)). Plaintiffs allege that the harm to the  
 4 putative class is substantial for purposes of the UCL. They claim that Defendant easily could  
 5 provide safeguards to prevent billing for invalid and fraudulent clicks, Complaint ¶ 38, and that  
 6 the detriments of the complained of practice are not outweighed by the countervailing benefits.

7 Defendant points out that a practice cannot be “unfair” under the UCL if the practice  
 8 expressly has been held to be lawful, citing to *Lazar v. Hertz Corp.*, 69 Cal. App. 4th 1494, 1506  
 9 (1999). *Lazar* found that “[t]he UCL does not apply if the Legislature has expressly declared the  
 10 challenged business practice to be lawful in other statutes.” *Id.* However, this does not mean  
 11 that the UCL does not apply to a practice simply because a private agreement between the parties  
 12 allows for it, particularly if the alleged injury is one that Plaintiffs reasonably could not have  
 13 avoided. “[C]onsumers cannot have reasonably avoided the injury if they could not have  
 14 reasonably anticipated the injury, if they did not have the means to avoid the injury, or if their  
 15 free market decisions were unjustifiably hampered by the conduct of the seller.” *Camacho*, 142  
 16 Cal. App. 4th at 1405. At least with respect to “invalid clicks”, the Court concludes that  
 17 Plaintiffs have stated a claim that they reasonably could not have avoided the injury because of  
 18 the ambiguities in the Disclaimer. At the same time, because they have not shown how the  
 19 Disclaimer is ambiguous as to click fraud, that aspect of their UCL claim is insufficient.

## 20 **G. Declaratory Relief**

21 Plaintiffs seek a judicial declaration of their rights under the Written Agreement.  
 22 Defendant argues that this claim should be dismissed because a determination of Plaintiffs’  
 23 breach of contract claims will settle Plaintiffs’ legal rights, rendering a declaratory judgment  
 24 duplicative. In deciding whether declaratory relief is appropriate, the court first determines  
 25 whether there is an actual case or controversy within its jurisdiction. *Principal Life Ins. Co. v.*  
 26 *Robinson*, 394 F.3d 665, 669 (9th Cir. 2005). If an actual case or controversy does exist, the  
 27 court must decide whether to exercise its jurisdiction over the controversy by examining the  
 28 factors announced in *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942). *Id.* The factors state that

“1) the district court should avoid needless determination of state law issues; 2) it should discourage litigants from filing declaratory actions as a means of forum shopping; and 3) it should avoid duplicative litigation.” *Principal Life*, 394 F.3d at 672. If the court does not exercise jurisdiction, it must explain the basis of its decision on the record. *Id.* In the instant case, there is an actual controversy regarding the rights of the parties under the Written Agreement. While resolution of the declaratory judgment claim does involve state law issues of contractual interpretation, the determination is not superfluous because the Written Agreement must be interpreted in order to resolve the breach of contract claim.

### III. MOTION TO STRIKE

Pursuant to Federal Rule of Procedure Rule 12(f), the Court may strike “from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). Motions to strike generally will not be granted unless it is clear that the matter to be stricken could not have any possible bearing on the subject matter of the litigation. *See LeDuc v. Kentucky Central Life Insurance Co.*, 814 F. Supp. 820 (N.D. Cal. 1992). Allegations “supplying background or historical material or other matter of an evidentiary nature will not be stricken unless unduly prejudicial to defendant.” *Id.* Moreover, allegations which contribute to a full understanding of the complaint as a whole need not be stricken. *See id.*

Defendant moves to strike paragraph 42 of the complaint, arguing that it is unduly prejudicial. Paragraph 42 purports to provide “a sample of complaints from Facebook advertisers found on an advertising industry website, WickedFire.com, regarding Defendant’s practice of charging advertisers for invalid, non-existent and fraudulent clicks”. Complaint ¶ 42. The six statements provided are not attributed to any particular author. Plaintiffs allege that the statements relate to the complaints of “absent Class members” and that Defendant is not prejudiced by allegations that are found on a public website. Plaintiffs’ Opp’n at 23. Defendant does not allege that it will suffer any specific undue prejudice, arguing only that the statements are hearsay and minimally probative. This is insufficient to demonstrate undue prejudice.

**IV. ORDER**

- (1) Defendant's motion to dismiss is GRANTED with respect to Counts Two, Four, and Six in their entirety, with respect to Count One insofar as it alleges fraudulent conduct, and with respect to Count Three insofar as it alleges a breach of the implied covenant of good faith and fair dealing. The motion otherwise is DENIED;
- (2) The motion to strike is DENIED; and
- (3) Plaintiffs shall have leave to amend consistent with the foregoing discussion. Any amended pleading shall be filed and served within thirty (30) days of the date this order is filed.

DATED: 4/22/10

  
JEROME FOGEL  
United States District Judge